No. 10-291

In the Supreme Court of the United States

IN RE NED COMER, ET AL., PETITIONERS

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE TENNESSEE VALLEY AUTHORITY IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals should have dismissed the appeal after determining that it lacked a quorum to proceed with rehearing en banc.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-32) is reported at 607 F.3d 1049. The order of the court of appeals granting rehearing en banc (Pet. App. 46-48) is reported at 598 F.3d 208, and the earlier opinion of a panel of the court of appeals is reported at 585 F.3d 855.

JURISDICTION

The order of the court of appeals dismissing petitioners' appeal was entered on May 28, 2010. The petition for a writ of mandamus was filed on August 26, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1651(a).

STATEMENT

1. The petition for a writ of mandamus turns on whether the court of appeals possessed a quorum to consider the underlying case after it granted rehearing en

banc. Congress has addressed how courts of appeals should hear cases as follows:

> (c) Cases and controversies shall be heard and determined by a court or panel of not more than three judges * * *, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486 (92 Stat. 1633)[.]
>
> (d) A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum.

28 U.S.C. 46(c)-(d).[1]

Rule 35 of the Federal Rules of Appellate Procedure governs en banc proceedings and specifies that "[a] majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc." Fed. R. App. P. 35(a). In 2005, the phrase "and who are not disqualified" was added to that provision to eliminate a divergence in the practices of certain circuits concerning the effect that disqualifications had on the number of votes necessary to grant rehearing en banc. Before that amendment,

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[1] The provision that is cross-referenced in Section 46(c)—Section 6 of the Act of October 20, 1978—provides that "[a]ny court of appeals having more than 15 active judges * * * may perform its en banc function by such number of members of its en banc courts as may be prescribed by rule of the court of appeals." Pub. L. No. 95-486, 92 Stat. 1633. Although the Fifth Circuit has sometimes had more than 15 active judges, it has never adopted a rule prescribing smaller en banc panels.

seven circuits (including the Fifth Circuit) had required the votes of an absolute majority of active judges to grant rehearing en banc. See Fed. R. App. P. 35, Comm. Notes on Rules—2005 Amend. (2005 Adv. Comm. Notes). Under that so-called "absolute majority" approach, "disqualified judges [we]re counted in the base in calculating whether a majority of judges ha[d] voted to hear a case en banc." *Ibid.*; see also *ibid.* ("[I]n a circuit with 12 active judges, 7 must vote to hear a case en banc. If 5 of the 12 active judges are disqualified, all 7 non-disqualified judges must vote to hear the case en banc."). By contrast, six circuits followed a "case majority" approach, which did not count judges who were disqualified in a particular case when determining the majority needed to grant rehearing en banc. *Ibid.* ("[I]n a case in which 5 of a circuit's 12 active judges are disqualified, only 4 judges (a majority of the 7 non-disqualified judges) must vote to hear a case en banc."). Two of those case-majority courts (the First and Third Circuits) qualified that approach further by adding a quorum requirement, which "provid[ed] that a case cannot be heard en banc unless a majority of all active judges—disqualified and non-disqualified—are eligible to participate." *Ibid.*

The 2005 amendment to Rule 35(a) adopted the case-majority approach, without any additional quorum requirement, although the Advisory Committee noted that the amendment was "not meant to alter or affect the quorum requirement of 28 U.S.C. § 46(d)." 2005 Adv. Comm. Notes. It further stated that the amendment was "not intended to foreclose the possibility that § 46(d) might be read to require that more than half of all circuit judges in regular active service be eligible to

participate in order for the court to hear or rehear a case en banc." *Ibid.*

2. Petitioners are residents and owners of property along the Mississippi coast of the Gulf of Mexico. They filed a putative class action in the United States District Court for the Southern District of Mississippi against respondents (the Tennessee Valley Authority (TVA) and more than two dozen private-sector entities in the energy and chemical industries). Petitioners alleged that respondents' activities had "caused the emission of greenhouse gas[es] that contributed to global warming" and "in turn caused a rise in sea levels and added to the ferocity of Hurricane Katrina, which combined to destroy [petitioners'] private property, as well as public property useful to them." They asserted claims for compensatory and punitive damages under Mississippi common law. See *Comer* v. *Murphy Oil USA*, 585 F.3d 855, 859 (5th Cir. 2009), vacated, 598 F.3d 208 (5th Cir. 2010).

On August 30, 2007, the district court dismissed petitioners' complaint, holding that they lacked standing and that their claims were nonjusticiable under the political-question doctrine. See Dist. Ct. Docket entry No. 368. The court explained its reasoning in an oral ruling from the bench. See *Comer*, 585 F.3d at 860 n.2.

Petitioners appealed, and a panel of the Fifth Circuit reversed in part, holding that petitioners had standing to raise some (but not all) of their claims, see *Comer*, 585 F.3d at 862-869, and that those claims were justiciable, *id.* at 869-879.[2]

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[2] Judge Davis concurred specially, stating he would have affirmed the dismissal of petitioners' claims on the alternative ground that they had "failed to allege facts that could establish that [respondents'] actions were a proximate cause of [petitioners'] alleged injuries." 585 F.3d at 880.

3. Respondents sought, and the court of appeals granted, rehearing en banc. See Pet. App. 46-48. By virtue of a local rule of the court of appeals, the grant of rehearing en banc had the effect of vacating the panel's opinion and judgment. See 5th Cir. R. 41.3 ("Unless otherwise expressly provided, the granting of a rehearing en banc vacates the panel opinion and judgment of the court and stays the mandate."). When the court of appeals granted rehearing en banc, on February 26, 2010, seven of the 16 active judges on the court of appeals were recused from the case, and the order granting rehearing en banc was issued by nine non-recused judges. See Pet. App. 47; see also *id.* at 2 (describing the rehearing order as having been based on "a duly constituted quorum of the court consisting of nine members in regular active service who are not disqualified").[3] In the next nine weeks, petitioners and respondents filed supplemental briefs, and the court permitted two amicus briefs to be filed. See 07-60756 Docket entries (5th Cir. Mar. 31, Apr. 23, and Apr. 30, 2010).

On April 30, 2010, the court of appeals notified the parties that one more judge had recused herself from the case, leaving the Fifth Circuit with eight active judges and eight recused judges (in addition to one vacancy). See Pet. App. 3, 44. On May 6, 2010, the court directed the parties to file letter briefs addressing the conclusion that the en banc court had "lost its quorum" and could not "act on the merits of this case." *Id.* at 44. That notification suggested that the parties address, among other things, whether Rule 35(a) of the Federal

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[3] The petition appendix erroneously omits Judge Owen from the list of judges participating in the order granting rehearing en banc. Compare Pet. App. 47, with 598 F.3d at 210.

Rules of Appellate Procedure could "be construed to provide a quorum." *Id.* at 45.

In their letter briefs, respondents contended that, despite the additional recusal, the en banc court had a quorum to decide the case and that, even if the court concluded that it lacked a quorum, it could and should achieve one by invoking the rule of necessity to permit a recused judge or judges to sit, or by requesting that the Chief Justice temporarily assign an active judge from another circuit pursuant to 28 U.S.C. 291(a). Respondents contended as a last resort that, if the court found that it incurably lacked a quorum, it should dismiss the appeal. See Resp. C.A. Letter Br. (May 12, 2010); Resp. C.A. Letter Reply Br. (May 17, 2010).

In their letter briefs, petitioners contended that, with only eight non-recused judges, the court of appeals had lost its quorum, and that it should accordingly allow the original panel to rule on respondents' rehearing petition. They also argued that the rule of necessity is inapplicable to en banc determinations and that it would violate the separation of powers for the Chief Justice to designate someone from another circuit to sit on the case. See Pet. C.A. Letter Br. (May 12, 2010); Pet. C.A. Letter Reply Br. (May 17, 2010).

4. a. On May 28, 2010, five of the eight non-recused judges, over the dissent of three judges, issued an order directing the clerk to dismiss the appeal. Pet. App. 1-6. The five judges explained that the grant of rehearing en banc "by a duly constituted quorum" of nine judges had vacated the panel's opinion and judgment and stayed the mandate, *id.* at 2, but that the "en banc court lost its quorum" upon the later recusal of an additional judge, *id.* at 3. The order stated that, "[a]bsent a quorum, no court is authorized to transact judicial business." *Ibid.*

Nevertheless, the order stated that the absence of a quorum did not "preclude the internal authority of the body" from "stat[ing] the facts as they exist in relation to that body, and [applying] the established rules to those facts." *Ibid.*

The order explained that "this en banc court" had "considered and rejected" five alternatives to dismissing the appeal because the court could not "conduct further judicial business in this appeal." Pet. App. 3, 6. The court declined to ask the Chief Justice of the United States to appoint a judge from another circuit, stating without further explanation that 28 U.S.C. 291 "provides an inappropriate procedure, unrelated to providing a quorum for the en banc court of a circuit." Pet. App. 3. The court also declined to invoke the "rule of necessity" as a basis to "allow[] disqualified [Fifth Circuit] judges to sit," concluding that "it would be inappropriate to disregard the disqualification of the judges of this Court when the appeal may be presented to the Supreme Court of the United States for decision." *Id.* at 4. And the court declined to hold the case in abeyance until the composition of the court changed to permit en banc action. The court expressed concern about the resulting delay, as well as uncertainty about when and whether the court would regain a quorum. *Id.* at 5.

The other dispositions that the court of appeals rejected depended on alternative constructions of the governing rules and statutes that would have avoided the conundrum it perceived. The court declined to conclude that the eight non-recused judges were sufficient to constitute a quorum, stating without further elaboration: "We believe that a quorum is properly defined under 28 U.S.C. § 46 as constituting a majority of the judges of the entire court who are in regular active service, and

not as a body of the non-recused judges of the court, however few." Pet. App. 3-4. The court also rejected the option of reinstating the panel's opinion and judgment, because they had been "lawfully vacated" and the subsequent absence of a quorum deprived the en banc court of any "authority to rewrite the established rules of the Fifth Circuit for this one case and to order this case, properly voted en banc, 'dis-enbanced.'" *Id.* at 4.

b. Three of the non-recused judges—all members of the original panel—dissented from the order dismissing petitioners' appeal. See Pet. App. 6-32. Judge Davis, joined by Judge Stewart, agreed that the court of appeals did "not have a quorum * * * to act in this case." *Id.* at 6.[4] He suggested that the non-recused judges should "declar[e] that the loss of a quorum automatically dis-enbanced the case causing [it] to return to its status before it was voted en banc." *Id.* at 7. In his view, "Local Rule 41.3 was never designed to apply in this situation," and "[i]t makes no sense to allow a vote to take a case en banc to dictate the result on the merits." *Ibid.* In the alternative, Judge Davis concluded that, although it would be "unusual," it would nevertheless be appropriate to request that the Chief Justice designate a judge from another circuit in order "to constitute a quorum of the en banc court." *Id.* at 8-9.

Judge Dennis (the author of the panel opinion) dissented and disagreed about the absence of a quorum.

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[4] Although immaterial to the result, Judge Davis's opinion said that the original en banc vote was taken when "nine of the seventeen active judges were unrecused and qualified to participate in a vote." Pet. App. 6. There were, however, 16 active judges at the time of the vote (see *id.* at 47; 598 F.3d at 210), because Judge Barksdale assumed senior status in August 2009. See United States Courts, *Current Judicial Vacancies*, http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/CurrentJudicialVacancies.aspx (last visited Nov. 29, 2010).

Pet. App. 9-32. He concluded that the language of 28 U.S.C. 46(c) and (d) requires a case-specific interpretation of the composition of the en banc court, which excludes disqualified judges. *Id.* at 14-18. Under that reading, a quorum in this case would be "a majority of" the "eight judges who are not disqualified." *Id.* at 15.

Judge Dennis also would have approved any of three alternatives that the majority rejected. He agreed with the other two dissenters that 28 U.S.C. 291 provided an appropriate mechanism for the Chief Justice to appoint a judge from another circuit to ensure a quorum. Pet. App. 27-30. He suggested that the court could hold the case until it obtained a quorum. *Id.* at 30-31. And he concluded that, as a "last resort," the court could invoke the "Rule of Necessity" to "ask the active circuit judges who have recused themselves from this case to consider setting aside their recusals in order to decide this appeal." *Id.* at 21.

5. On August 26, 2010, petitioners filed their petition for a writ of mandamus in this Court, seeking an order "directing" the Fifth Circuit to "return" their appeal "to the [three-judge] panel for final adjudication." Pet. 6. Petitioners did not seek a writ of certiorari to review the issues addressed by the panel's vacated decision or otherwise bring the underlying case before this Court.

On September 30, 2010, one of the previously recused judges on the court of appeals, Judge Wiener, assumed senior status. See United States Courts, *Current Judicial Vacancies*, http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/CurrentJudicialVacancies.aspx (last visited Nov. 29, 2010). Since that date, the Fifth Circuit has had 15 active judges, including eight judges who were not recused from petitioners' case on May 28, 2010. See United States Courts, *Fifth Circuit*

Detail Report, http://www.uscourts.gov/uscourts/Judges Judgeships/Vacancies/reports/jdarjdtl_appeals_A_05.html (last visited Nov. 29, 2010).

ARGUMENT

Petitioners have not satisfied the stringent standards necessary to warrant the extraordinary relief of mandamus. Mandamus is appropriate only when no other remedy is available, yet in this case the Court's certiorari jurisdiction would have extended to the order dismissing petitioners' appeal. Nor does this case—in which the court of appeals dismissed petitioners' appeal after entertaining proceedings for 30 months—involve the kind of judicial usurpation of power that this Court has previously found worthy of the discretionary exercise of its mandamus jurisdiction. Even if it did, petitioners have not demonstrated a clear and indisputable right to the relief they seek, because no constitutional or statutory provision guarantees them a right to a decision on appeal, and they acknowledge that multiple, inconsistent procedural outcomes are permissible. Moreover, their claims of error assume that the en banc court lacked a quorum when it dismissed the case, but the better reading of the relevant statute is that the court still possessed a quorum at that time. In any event, the recent decrease in the number of active judges on the court of appeals means that the en banc court would now appear to have a quorum even under petitioners' view, which would make the disposition they say was compelled—a remand to the three-judge panel—inappropriate, even if that disposition might otherwise have been warranted.

1. Under Supreme Court Rule 20.1, a mandamus petition must show that mandamus "will be in aid of the Court's appellate jurisdiction," that "exceptional circumstances" warrant its issuance, and that "adequate relief

cannot be obtained in any other form or from any other court." As this Court has explained, mandamus is available only in extraordinary cases to correct a lower court's "judicial usurpation of power" or "clear abuse of discretion." *Cheney* v. *United States Dist. Court*, 542 U.S. 367, 380 (2004) (internal quotation marks omitted). The party seeking a writ of mandamus bears the burden of proving that it has no other means of obtaining the relief desired, *Mallard* v. *United States Dist. Court*, 490 U.S. 296, 309 (1989), and that its "right to issuance of the writ is 'clear and indisputable,'" *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 384 (1953) (quoting *United States* v. *Duell*, 172 U.S. 576, 582 (1899)). Moreover, even when those "two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Cheney*, 542 U.S. at 381. Those stringent standards reinforce this Court's repeated observations that the writ is a "'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'" *Id.* at 380 (quoting *Ex parte Fahey*, 332 U.S. 258, 259-260 (1947)). Petitioners have failed to meet those standards.

2. As an initial matter, petitioners have not established that mandamus is the only means for them to obtain relief. In fact, as the court of appeals suggested (Pet. App. 6)—and as petitioners themselves repeatedly acknowledged in the court of appeals[5]—petitioners could

[5] Petitioners invoked the prospect of this Court's certiorari jurisdiction in arguing against application of the rule of necessity and also in arguing that the court of appeals should not follow a practice of the Judicial Panel on Multidistrict Litigation. See Pet. C.A. Letter Br. 9 ("The Supreme Court can address the issues raised in this case."); Pet. C.A. Letter Reply Br. 4 ("[T]he litigants here have another avenue for relief by way of an application for writs of Certiorari to the U.S. Supreme Court.").

have sought review in this Court by petitioning for a writ of certiorari. Although they now assert in passing that certiorari is inapplicable to "cases for which the court of appeals did not reach a decision," Pet. 23, they do not address the terms of the controlling statute. Under 28 U.S.C. 1254(1), the Court's certiorari jurisdiction extends to all "[c]ases in the courts of appeals" and encompasses "any civil or criminal case, before or after rendition of judgment or decree."

Here, after petitioners appealed the district court's final order dismissing their complaint, their case was plainly "in the court[] of appeals" in the sense meant by Section 1254. And when the court directed the clerk "to dismiss the appeal," Pet. App. 6, it rendered a "judgment or decree." That dismissal order could have been subject to review by writ of certiorari. See *Nixon* v. *Fitzgerald*, 457 U.S. 731, 742-743 & n.23 (1982). Moreover, even if the dismissal order did not constitute a "judgment or decree," the case was nonetheless "in the court[] of appeals" for purposes of certiorari jurisdiction. See, *e.g.*, *Heckler* v. *Edwards*, 465 U.S. 870, 876 (1984) (reviewing on certiorari a court of appeals order dismissing case on ground that it lacked statutory jurisdiction over appeal).[6]

Even in the absence of any of the other deficiencies discussed below, petitioners' inability to establish that they were unable to obtain relief from this Court "in any

[6] For similar reasons, petitioners cannot establish that mandamus would be necessary "in aid of th[is] Court's appellate jurisdiction." Sup. Ct. R. 20.1. If petitioners had sought review by certiorari of the standing and political-question-doctrine issues that were addressed by the district court and the three-judge panel, there would have been no doubt about this Court's jurisdiction. Although petitioners have declined to invoke this Court's jurisdiction over those issues (Pet. 22-23), that tactical decision cannot create a need for extraordinary relief.

other form" (Sup. Ct. R. 20.1) is sufficient to show that mandamus relief is unwarranted.

3. Petitioners also fail to establish the second predicate for mandamus: that they have a clear and indisputable right to relief. See *Cheney*, 542 U.S. at 381. That failure is evident on the face of their petition, because petitioners themselves are uncertain about the proper course for the court of appeals to have followed and the rationale supporting any such course. Petitioners principally argue that they are entitled to have this case "returned to the [three-judge] panel for action." Pet. 25; see also Pet. 6, 29, 35-36. But they also assert that it would not have been "unreasonable" for the Fifth Circuit to "plac[e] the case on a special docket to wait until a new judge could be confirmed." Pet. 31, 32. Waiting for a new judge to join the en banc court is inconsistent with being obligated to remand the case to the original panel, and it is difficult to see how petitioners can have a "clear and indisputable" right to two mutually exclusive outcomes.

a. With respect to the course they principally endorse (a remand for proceedings before the three-judge panel), petitioners propose three different mechanisms, based on shifting and unpersuasive rationales. First, they contend that the court of appeals was obligated to vacate its valid order granting rehearing en banc. Their only authority for that result is the assertion that, "if [the majority] had the authority to dismiss the entire appeal, then they should have had the authority to vacate the order granting en banc rehearing." Pet. 29. But the implication petitioners would draw is inconsistent with the venerable principle that dismissing a case does not require a court to exercise judicial power. See, *e.g.*, *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)

("Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.").[7] Thus, the "power" to dismiss a case cannot be bootstrapped into the power to vacate a valid order.

Second, petitioners maintain in the alternative that there was in fact no need for the en banc court to vacate the order granting rehearing, because Fifth Circuit Rule 41.3 is "not consistent with the U.S. Constitution, 28 U.S.C. § 1291, and Fed. R. App. P. 3-4," and therefore the panel's original decision has not actually been vacated. Pet. 30. And, offering yet a third alternative, petitioners contend that the Fifth Circuit was obliged to "suspend Local Rule 41.3" in this case by exercising its power under Rule 2 of the Federal Rules of Appellate Procedure "to suspend local rules." Pet. 31. Petitioners' second and third proposed mechanisms for returning the case to the original three-judge panel turn upon their erroneous claim (Pet. 6) that the dismissal of their appeal violated their "statutory and constitutional right to have their appeal decided."

b. The dismissal of petitioners' appeal did not violate constitutional principles of equal protection or the statutory provision of appellate jurisdiction in 28 U.S.C. 1291.

Petitioners argue that "[f]ederal courts have an absolute duty to exercise jurisdiction once it has been conferred." Pet. 14; see also Pet. 15 n.24 (citing 28 U.S.C. 1291; Fed. R. App. P. 3, 4).[8] But the court of appeals did

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[7] For the same reason, petitioners err when they contend that "[i]f the Fifth Circuit lacked an en banc quorum, then the five judge ad hoc group could not *sua sponte* issue dismissal orders." Pet. 19.

[8] Petitioners' statement of such a sweeping legal principle is wrong. As this Court has held, the duty to exercise jurisdiction "is not * * * absolute." *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 716 (1996).

not simply decline to exercise its jurisdiction over their appeal. To the contrary, the earlier panel heard and decided petitioners' appeal from the district court's final judgment, the en banc court considered and granted respondents' petition for rehearing en banc, and the en banc court considered various alternatives to determine whether it had a quorum or could obtain one.

This is thus not a case concerning a court's discretionary decision to decline to exercise jurisdiction. Nor is the proper role of 28 U.S.C. 1291 an issue. Petitioners exercised their right to appeal the district court's judgment. But a right to appeal does not necessarily entail a right to a decision on the merits. As noted above, dismissal of an appeal is indisputably proper when a court lacks authority to act, such as where a plaintiff lacks standing or where a party appeals an interlocutory order that does not come within an exception to the final-order requirement or where a case has become moot.

Instead, the dispute here arises out of the proper construction of federal rules and statutes. The court of appeals concluded that it lacked authority to proceed with the merits of the appeal due to its interpretation of the statutory quorum requirement, and that it could take no further action other than dismissing the appeal. If the court was correct that it lacked a quorum, and it was thus unable to issue a decision on the merits of the appeal, nothing in the Constitution or any federal statute prohibited its order of dismissal. But even if the court misinterpreted those authorities, that conclusion on its own terms does not implicate any right to an appellate decision grounded in a rule, statute, or constitutional guarantee. Nor, in any event, would mere legal error suffice to require mandamus relief. See, *e.g.*, *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 27 (1943)

(finding mandamus relief unwarranted when lower court's "decision, even if erroneous[,] * * * involved no abuse of judicial power, and any error which it may have committed is reviewable by [direct appeal and then certiorari]").

As the constitutional basis for their claim, petitioners contend (Pet. 16) that the equal-protection component of the Fifth Amendment prohibited the court of appeals from dismissing their appeal. But petitioners are not members of a protected class, and they cannot claim a violation of any constitutionally protected right. They are accordingly not entitled to heightened scrutiny. The Fifth Circuit's rationale was plainly sufficient to survive rational-basis review.

In alleging that they received unequal treatment, petitioners contend (Pet. 16 & n.29) that "the panel decision would not have been vacated" if their suit had been pending in one of the eight circuits that have not adopted a local rule similar to Fifth Circuit Rule 41.3. Their focus on Rule 41.3, however, is unwarranted, because it establishes only a default option (*i.e.*, that the panel's decision will typically be vacated when rehearing en banc is granted). Even in the absence of the rule, the en banc court could have expressly provided that the panel's decision was vacated when it granted rehearing and assumed control over the case under Section 46(c). Indeed, that was the "long-standing practice" that was codified by Rule 41.3's predecessor in 1978, see *United States* v. *Gutierrez-Barron*, 602 F.2d 722, 723 (5th Cir.), cert. denied, 444 U.S. 983 (1979). More importantly, a similar procedure can be, and often is, followed in nearly all of the circuits that lack the "automatic[]" rule that

petitioners malign (Pet. 16).[9] There is thus no basis to conclude that petitioners have suffered any discrimination on account of where they filed their appeal. And to the extent that another court might follow a different procedure, Congress has long authorized every federal court to adopt its own rules of procedure (see 28 U.S.C. 2071; Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 83), so a mere difference in the rules of particular courts does not violate equal-protection principles.

c. Petitioners' proposed fallback approach—allowing the Fifth Circuit "to wait until a new judge is confirmed to see if the en banc court can act," Pet. 32-33—poses different problems. Although petitioners say that "[t]he parties briefed the possible solution of placing the case on a special docket to wait until a new judge could be confirmed," Pet. 31, they do not acknowledge that

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[9] See, *e.g.*, 1st Cir. Internal Operating Procedures (I.O.P.) X.D ("Usually when an en banc rehearing is granted, the previous opinion and judgment will be vacated."); 3d Cir. I.O.P. 9.5.9 ("[T]he chief judge enters an order which grants rehearing * * * [and] vacates the panel's opinion in full or in part and the judgment entered thereon."); 7th Cir. I.O.P. 5(e) ("An order granting rehearing en banc should specifically state that the original panel's decision is thereby vacated."); *Nelson* v. *Correctional Med. Servs.*, 583 F.3d 522, 525 (8th Cir. 2009) (noting the court granted a "petition for rehearing en banc and vacated the panel opinion"); D.C. Cir. R. 35(d) ("If rehearing en banc is granted, the panel's judgment, but ordinarily not its opinion, will be vacated."); *Princo Corp.* v. *International Trade Comm'n*, 583 F.3d 1380, 1380-1381 (Fed. Cir. 2009) (order granting petitions for rehearing en banc and vacating panel opinion); see also *Animal Legal Def. Fund* v. *Veneman*, 490 F.3d 725, 728 (9th Cir. 2007) (Bybee, J., concurring) (explaining that the Ninth Circuit treats a panel opinion as "not precedential" from the time rehearing is granted, but it no longer follows the "widely accepted practice" of "formally vacat[ing]" the panel opinion when granting rehearing en banc, because that could cause West to omit the panel's opinion from the *Federal Reporter*).

their contribution to the "brief[ing]" of that possibility was to urge the court of appeals against using it. See Pet. C.A. Letter Br. 10 ("[T]he step of putting the case in a special docket [to see if a quorum could later be obtained] as was done in *North American Co.* [v. *SEC*, 320 U.S. 708 (1943),] is simply not required, and in effect gives [respondents] a right of en banc review when no such right exists."). Petitioners cannot plausibly claim that they now have a "clear and indisputable" right to an order compelling the court of appeals to do something they previously argued it should not do. Cf. *Whitehouse* v. *Illinois Cent. R.R. Co.*, 349 U.S. 366, 373 (1955) (noting that "mandamus is itself governed by equitable considerations and is to be granted only in the exercise of sound discretion").

Moreover, to the extent petitioners admit that further proceedings before the en banc court could prevent their appeal from being dismissed, they have not explained why the acting chief judge could not have requested, pursuant to 28 U.S.C. 291(a), that the Chief Justice "designate and assign temporarily" one or more judges from another circuit to "act as circuit judge" in this case. The terms of Section 291(a) do not limit that authority to three-judge panels, as opposed to en banc courts. Instead, the statute authorizes the Chief Justice to make an assignment when it is "in the public interest." *Ibid.* Petitioners suggest (Pet. 33) that such assignments "violate[] separation of powers." But that objection has no merit, because the various circuits are creatures of statute, and the ability to perform out-of-circuit judicial work is inherent in the statutory definition of the offices to which circuit judges are confirmed and appointed. Out-of-circuit retired judges (and Justices) routinely sit by designation on court-of-appeals

panels pursuant to statutory authorization. See 28 U.S.C. 294(a) and (d); see also 28 U.S.C. 46(b) (authorizing a circuit's chief judge to waive the requirement that a majority of the judges on a three-judge panel be "judges of that court"). And Congress has specifically provided that Section 291 (and other provisions) may be used to "fill[]" the slots of disqualified circuit judges when this Court lacks a quorum and remits a case on direct appeal. 28 U.S.C. 2109; see *United States* v. *Will*, 449 U.S. 200, 212-213 & n.13 (1980) (recognizing that the provisions cross-referenced in Section 2109 are located at 28 U.S.C. 291-296).[10]

In any event, steps that would allow the en banc court to acquire a quorum by waiting for an additional judge or judges—either a new Presidential appointee or a temporary designee of the Chief Justice—are plainly discretionary. Mandamus relief would not be appropriate to compel the Fifth Circuit to take such steps in the absence of a clear and indisputable right to a particular course, which petitioners have not met their burden of demonstrating.

4. Even if petitioners were able to establish a clear and indisputable right to have their appeal reinstated before the court of appeals, they still have not satisfied the independent requirement that the extraordinary exercise of this Court's discretion associated with manda-

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[10] Nor does Fifth Circuit precedent foreclose the use of Section 291(a) in this context. See Pet. App. 3 (citing *United States* v. *Nixon*, 827 F.2d 1019 (5th Cir. 1987), cert. denied, 484 U.S. 1026 (1988)). In *Nixon*, the Fifth Circuit rejected the use of Section 291(a) at an earlier stage—when the court of appeals was considering whether to grant rehearing en banc. See *id.* at 1021-1022. Here, by contrast, a properly constituted en banc court voted to grant rehearing en banc in this case, making *Nixon*'s rationale (that only judges from within the circuit should make that decision) inapplicable.

mus be "appropriate under the circumstances." *Cheney*, 542 U.S. at 381. In the past, the Court has found such circumstances when a lower court was, for example, "threaten[ing] the separation of powers," or intruding on "a delicate area of federal-state relations," *ibid.* (citing cases), or failing to implement the mandate of this Court's decisions, see *Vendo Co.* v. *Lektro-Vend Corp.*, 434 U.S. 425, 427-428 (1978) (per curiam) (citing cases). This case does not present any similar judicial usurpation of power.

Petitioners contend (Pet. 24-25) that mandamus is "appropriate" because this case involves questions about judicial recusal. But of the 14 cases they cite to illustrate that contention (Pet. 24-25 nn.47-48), not one involved a grant of mandamus based on a conclusion that a lower court had (as alleged here) incorrectly *refrained* from proceeding in a case. Instead, each of the five cited cases in which mandamus relief was granted involved a determination by a court of appeals that a district judge (or special master) had erroneously refused to recuse and continued to sit improperly in a case. See *Cobell* v. *Norton*, 334 F.3d 1128, 1139 (D.C. Cir. 2003); *In re School Asbestos Litig.*, 977 F.2d 764, 775 (3d Cir. 1992); *In re Aetna Cas. & Sur. Co.*, 919 F.2d 1136, 1143 (6th Cir. 1990) (en banc); *In re Faulkner*, 856 F.2d 716, 721 (5th Cir. 1988); *United Family Life Ins. Co.* v. *Barrow*, 452 F.2d 997, 998 (10th Cir. 1971).

Petitioners suggest that the court of appeals usurped the power of the three-judge panel by "assum[ing] that once the en banc court voted to grant rehearing, the panel lost authority to act." Pet. 21. In petitioners' view, the panel "never actually lost" control of the case, and it thus "could have continued to exert the authority it never lost, and could have reheard the case based on

the new briefing, issuing a new decision or reinstating its previous decision." Pet. 21, 29. Petitioners argue that "no rule or law" deprived the panel of its authority to act. Pet. 21. But they overlook the applicable statutory provision, which provides that a case or controversy "shall be heard and determined by a court or panel of not more than three judges * * *, *unless a hearing or rehearing before the court in banc is ordered* by a majority of the circuit judges of the circuit who are in regular active service." 28 U.S.C. 46(c) (emphasis added).

Petitioners do not dispute the validity of the court of appeals' February 26, 2010 order (Pet. App. 46-48) that their case be reheard en banc. Nor could they dispute its validity in light of Rule 35(a) of the Federal Rules of Appellate Procedure, which expressly provides that rehearing en banc may be ordered by "[a] majority of the circuit judges who are in regular active service and who are not disqualified." Under the terms of Section 46(c)'s "unless" clause, that order granting rehearing meant that the case would no longer be "heard and determined" by the three-judge panel.[11]

At the very least, that aspect of Section 46(c) further confirms that petitioners have not established that they had any "clear and indisputable" right to have the three-judge panel continue to consider the case after rehearing was validly ordered.

5. As the foregoing demonstrates, even assuming that the en banc court lacked a quorum to proceed, peti-

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[11] Petitioners note (Pet. 28) that the Fifth Circuit's Internal Operating Procedures allowed the panel to "retain[] authority to act after the petition for rehearing en banc was *filed*" (emphasis added), but that provision does not address what was to happen after the petition was *granted*. Even if it did, it could not overcome the plain meaning of the "unless" clause in the first sentence of Section 46(c).

tioners have failed to establish that they have a clear and indisputable right to relief that they could not obtain through other means, in order to prevent the kind of judicial usurpation that would warrant mandamus from this Court. Nevertheless, petitioners' argument is further compromised by their assumption that the en banc court lost its quorum when there were only eight non-recused judges (out of 16 active judges). In fact, as respondents argued in their May 12, 2010 letter brief to the court of appeals (at 1-4), the assumption that eight judges did not constitute a quorum was based on a misinterpretation of the governing statute.

a. Petitioners—like most of the judges on the court of appeals—apparently assume, without analysis or citation of authority, that Section 46(d)'s quorum requirement refers to all active judges, including those who may be disqualified. See Pet. 34; Pet. App. 3-4 (majority opinion), *id.* at 6 (Davis, J., dissenting, joined by Stewart, J.); but see *id.* at 10, 14-16 (Dennis, J., dissenting). That assumption, however, does not reflect the best interpretation of the statutory language.

Congress has defined a quorum of a court of appeals in 28 U.S.C. 46(d): "A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum." Paragraph (c) of Section 46, in turn, provides: "A court in banc shall consist of all circuit judges in regular active service." 28 U.S.C. 46(c). Neither provision specifically addresses the treatment of active judges who are disqualified in a particular case. Thus, the statute is, at least initially, ambiguous with respect to the question here. In context, however, the better reading of Section 46 is that a case-specific inquiry should be used in determining whether a court of appeals has a quorum.

Section 46 is unusual in defining the size and quorum of a federal court of appeals. Unlike this Court (and many other bodies), the courts of appeals vary in their composition, not just from circuit to circuit and from case to case, but between a panel and an en banc court.[12] There is no minimum number of judges for a court of appeals, and Section 46 accounts for the fact that their composition necessarily changes as circumstances require. Under the first sentence of Section 46(c), "[c]ases and controversies shall be heard and determined by a court or panel of not more than three judges * * *, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service." 28 U.S.C. 46(c). The second sentence—"[a] court in banc shall consist of all circuit judges in regular active service"—defines the composition of "[a] court in banc" and necessarily corresponds to the same phrase in the preceding sentence.

The Fourth Circuit has adopted a case-specific approach to the reference in Section 46(c) to "all circuit judges in regular active service." See *Arnold* v. *Eastern Air Lines, Inc.*, 712 F.2d 899, 903-904 (1983) (Murnaghan, J., concerning grant of rehearing en banc) (under the statute, "there shall be excluded, for quorum ascertainment purposes, any disqualified judge when a vote on a suggestion for hearing or rehearing *en banc* takes

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[12] This Court's size and quorum requirements are absolute. See 28 U.S.C. 1 ("The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum."). Thus, the case specific interpretation of Section 46 advanced here would not apply to this Court's quorum requirement.

place"), cert. denied, 464 U.S. 1040 (1984).[13] *Arnold* recognized that a disqualified judge "is regular and active, and as a general proposition is in service," but concluded that such a judge "is *out of service* insofar as that particular case is concerned." *Id.* at 904; see also *ibid.* ("for the particular case, he was not one of the circuit judges in regular active service").

That case-specific interpretation of Section 46(c) is reflected in the 2005 amendment to Federal Rule of Appellate Procedure 35(a). That rule specifies that a court of appeals may grant rehearing en banc on the basis of an order issued by the "majority of the circuit judges who are in regular active service *and who are not disqualified*" (emphasis added). The recent amendment—which was adopted by this Court pursuant to 28 U.S.C. 2072, see *Amendments to Federal Rules of Appellate Procedure*, 544 U.S. 1151, 1160 (2005)—added the italicized phrase and "adopt[ed] the case majority approach as a uniform national interpretation of § 46(c)." 2005 Adv. Comm. Notes. Thus, Rule 35(a) excludes disqualified judges from the denominator when calculating a majority, even though the parallel text in the first sentence of Section 46(c) does not expressly exclude disqualified judges. As the Advisory Committee on Appellate Rules explained, there is a sound basis for that exclusion: "It is clear that 'all circuit judges in regular active service' in the second sentence does not include disqualified judges, as disqualified judges clearly cannot participate in a case being heard or reheard en banc." *Ibid.* And, the "two nearly identical phrases appearing" in the first and second sentences of Section 46(c) should be interpreted in the same way. *Ibid.*

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[13] Judge Murnaghan's opinion on this point was joined by five other judges, a majority of the en banc court. See 712 F.3d at 902.

That same principle should extend to the definition of a quorum in Section 46(d), which expressly refers to "the number of judges authorized to constitute a court * * *, *as provided in paragraph (c)*." 28 U.S.C. 46(d) (emphasis added). As the Fourth Circuit recognized in *Arnold*, and as Rule 35(a) now demonstrates, the key question in understanding the majority requirement in Section 46(c) is the composition of the en banc court in a particular case, not in the abstract. If a case-specific understanding prevails when determining whether a majority exists to grant rehearing en banc, a similar, case-specific understanding of the composition of the en banc court should apply when determining whether a quorum of the en banc court exists after rehearing en banc has been granted.[14]

b. Petitioners' rejection of the case-specific approach is unwarranted and would have anomalous consequences.

Petitioners suggest in passing (Pet. 34) that the case-specific approach would allow an en banc decision to be issued by too few judges. But Section 46(c) does not impose any minimum size for an en banc court. The First Circuit, for example, has held that an en banc

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[14] As discussed above (pp. 3-4, *supra*), the Advisory Committee stated that the 2005 amendment to Rule 35(a) was "not meant to alter or affect the quorum requirement of 28 U.S.C. § 46(d)," and the Committee left open "the possibility that § 46(d) might be read to require that more than half of all circuit judges in regular active service be eligible to participate in order for the court to hear or rehear a case en banc." 2005 Adv. Comm. Notes. Although such an interpretation is possible, it is not the better interpretation of the statute, which should be read consistently as a whole. Some circuits have adopted a different definition of a quorum by local rule. See 1st Cir. R. 35.0(a); 3d Cir. I.O.P. 9.5.3; Fed. Cir. R. 47.11. Because the Fifth Circuit has not done so, this case does not directly present the question whether such rules are valid.

court consisting of only three judges is permissible (at a time when that court had four authorized judgeships, and one was vacant). See *United States* v. *Martorano*, 620 F.2d 912, cert. denied, 449 U.S. 952 (1980). Similarly, Congress has authorized large circuits to use en banc panels comprising fewer than the full number of active, non-disqualified judges on the court. See Act of Oct. 20, 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1633 (cited in 28 U.S.C. 46(c)) ("Any court of appeals having more than 15 active judges * * * may perform its en banc function by such number of members of its en banc courts as may be prescribed by rule of the court of appeals."). The Ninth Circuit routinely does so, pursuant to a rule that incorporates a case-specific understanding of the meaning of an "en banc court." See 9th Cir. R. 35-3 ("The en banc court, *for each case* * * *, shall consist of the Chief Judge of this circuit and 10 additional judges to be drawn by lot from the active judges of the Court.") (emphasis added). That rule expressly excludes any disqualified judge from the 11-judge en banc court. *Ibid.* ("If a judge whose name is drawn for a particular en banc court is disqualified, recused, or knows that he or she will be unable to sit at the time and place designated for the en banc case or cases, the judge will immediately notify the Chief Judge who will direct the Clerk to draw a replacement judge by lot."). Under petitioners' reading, which includes active but disqualified judges among the members of the en banc court, the Ninth Circuit would presumably be required to seat en banc panels with fewer than 11 judges.

Petitioners' interpretation would also result in another anomaly by counting disqualified active judges in the denominator for quorum purposes but, at the same time, excluding vacancies among the authorized judge-

ships. Section 46(d) says nothing about active judges, whether or not disqualified. Instead, the statute refers to "the number of judges authorized to constitute a court." 28 U.S.C. 46(d). Read literally, and divorced from the case-specific language in the prior subsection, that could be understood to refer to the number of judges Congress has authorized to be appointed to the circuit. See 28 U.S.C. 44(a) (listing the number of judgeships for each circuit). The Fifth Circuit has 17 authorized judges, although two of those positions are currently vacant. See pp. 9-10, *supra*. Nevertheless, the Fifth Circuit does not require an absolute majority of all authorized judgeships when determining whether a quorum exists, or in the related identification of the denominator for determining a majority of active judges voting in favor of rehearing en banc.[15] The contrary reading would create unnecessary barriers to the functioning of an en banc court when a circuit has multiple vacancies.[16]

Under the case-specific approach, the quorum requirement in Section 46(d) was not a barrier to disposition of the case by an en banc court of eight judges.

6. Nevertheless, even if petitioners were correct in concluding that the court of appeals lacked a quorum to proceed en banc when eight of 16 active judges were

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[15] See *Variable Annuity Life Ins. Co.* v. *Clark*, 13 F.3d 833, 834 (5th Cir. 1994) (Smith, J., dissenting from denial of rehearing en banc) (not counting four vacancies); see also, *e.g.*, *Martorano*, 620 F.2d at 920 (1st Cir.) (two of three judges constitute a majority authorized to grant rehearing en banc, not counting one vacancy).

[16] Three of 13 authorized judgeships on the Second Circuit are currently vacant, as are two of 15 on the Fourth Circuit, two of 12 on the Tenth Circuit, and two of 11 on the D.C. Circuit. See pages available at United States Courts, *Court of Appeals—Detail*, http://www.uscourts.gov/uscourts/JudgesJudgeships/Vacancies/reports/jdarjdtl_appeals.html (last visited Nov. 29, 2010).

recused (see Pet. 17), that no longer appears to be true, even under petitioners' own reasoning. As noted above (see p. 9, *supra*), one of the previously recused judges on the court of appeals assumed senior status on September 30, 2010. Thus, assuming arguendo that Section 46(c) and (d) require an en banc court to include at least an absolute majority of the circuit's active judges—something that is by no means clear or indisputable—the eight judges who were not recused on May 28, 2010 would suffice to constitute a majority now that there are only 15 active judges on the court (assuming no intervening events have triggered an additional recusal).[17]

That development would make it particularly inappropriate for this Court to exercise its extraordinary power of mandamus to "vacate the order granting rehearing en banc and return the case to the three-judge panel to decide the appeal." Pet. 36. Similarly, although petitioners briefly mention the possibility that the court of appeals "may now have an en banc quorum," Pet. 35, they do so for a different reason (which is not borne out by the facts).[18] There is accordingly no reason for this

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[17] Because Judge Wiener did not participate when the court decided that the case should be reheard en banc, Pet. App. 47 n.1, and when it dismissed the appeal, *id.* at 2 n.*, he would not be "eligible * * * to *continue to participate* in the decision" as a senior circuit judge under 28 U.S.C. 46(c)(2) (emphasis added); see also 5th Cir. R. 35.6 ("Any judge participating in an en banc poll, hearing, or rehearing while in regular active service who subsequently takes senior status may elect to continue participating in the final resolution of the case.").

[18] Petitioners suggest that "[t]he Fifth Circuit may now have an en banc quorum given the recent judicial appointment." Pet. 35; see also Pet. 32 & n. 61 (noting that the President nominated James E. Graves, Jr., to fill a Fifth Circuit vacancy in June 2010). There has not, however, been any "appointment" to the Fifth Circuit since petitioners' appeal was dismissed.

Court to give petitioners the benefit of that recent development, especially because, as discussed above (see pp. 17-18, *supra*), they argued that the court of appeals should not wait to allow a quorum to be established by virtue of changed circumstances.

Accordingly, this Court should not grant petitioners' extraordinary request that it "issue a writ of mandamus directing [the court of appeals] to reinstate [p]etitioners' appeal and return it to the panel for final adjudication." Pet. 6.[19]

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[19] Petitioners mention, in a one-sentence footnote without citation, that "[t]his Court * * * has the authority to convert a Petition for a Writ of Mandamus to a Petition for Certiorari." Pet. 25 n.49. It is true that this Court has, in rare instances, treated a mandamus petition as one for certiorari. In such cases, the petitioners themselves have often welcomed that option. See *Collier* v. *United States*, 382 U.S. 890 (1965) (treating mandamus petition as certiorari petition, when petitioner was *pro se* and incarcerated; expressly sought "a mandamus or some other appropriate order," Pet. at 2, *Collier*, *supra*, (Nos. 331 and 695 Misc.); referred in his reply brief (at 1) to his "plea for certiorari"; and stated in his reply brief (at 2) that "[t]he petition for a writ of certiorari should be granted"). Cf. *Mandel* v. *En Banc Court of Appeals for the Fourth Circuit*, 445 U.S. 959 (1980) (No. 79-1028) (denying motion for leave to file petition for mandamus seeking to vacate an en banc court's order affirming petitioners' convictions on the basis of an evenly divided vote, and to reinstate the panel opinion that had previously vacated petitioners' convictions); *Mandel* v. *United States*, 445 U.S. 961 (1980) (No. 79-1029) (denying certiorari petition challenging, in the alternative, the same evenly-divided en-banc-court decision). But see *Calderon* v. *Thompson*, 521 U.S. 1136 (1997) (granting certiorari in response to mandamus petition that lacked any request for certiorari). Here, rather than embracing the certiorari option in the alternative, petitioners contend that "a Writ of Mandamus is the proper remedy in this case." Pet. 25 n.49.

CONCLUSION

The petition for a writ of mandamus should be denied.

Respectfully submitted.

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